

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

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|-----------------------------|---|---------------------------|
| DANIEL AHNERT, ET AL, |) | CASE NO: 2:10-CV-00156-PP |
| |) | |
| Plaintiffs, |) | CIVIL |
| |) | |
| vs. |) | Milwaukee, Wisconsin |
| |) | |
| EMPLOYERS INSURANCE COMPANY |) | Monday, May 15, 2017 |
| OF WAUSAU, ET AL, |) | |
| |) | (3:01 p.m. to 3:32 p.m.) |
| Defendants. |) | |

STATUS / SCHEDULING CONFERENCE

BEFORE THE HONORABLE PAMELA PEPPER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Milwaukee, Wisconsin; Monday, May 15, 2017; 3:01 p.m.

Call to Order

THE CLERK: ... time cv-00156 here for a Scheduling Conference.

May I have the appearances, please, starting with the Plaintiff?

MR. MC COY: Robert McCoy for the Plaintiff, Judge.

MS. MC LAIN: Edna McLain for Papst Brewing Company.

MR. RHOADES: Travis Rhoades for Employers Insurance Company of Wausau, Sprinkmann Sons Corporation and Wisconsin Electric Power Company.

THE COURT: Good afternoon to everyone. Thank you all. I realize that you-all kind of scrambled after I put the docket remark on the docket about scheduling dates and I appreciate you-all jumping in there and doing that so quickly, especially given the fact that there have been some delays in this case, many of them attributable to me so I appreciate that.

The first order of business that I wanted to take up, though, is just sort of an administrative one, but I wanted to go ahead and get it done, and that is the motion that's on the calendar at Docket Number 102 which is a motion to correct the March 31st, 2017 Order which referred to the wrong -- basically used the wrong terminology for the damages.

Judge Robreno had talked about punitive and

1 compensatory damages, I think, as being reserved back to the
2 MDL Court and for some reason, and I mentioned somewhere in one
3 of my Orders, in my March 31st Order, "punitive and exemplary"
4 damages. Don't ask me where I pulled that word from, there's
5 no explanation, but of course I'm more than happy to correct
6 that and so I'm granting that Motion to correct that to read
7 "punitive and compensatory damages."

8 Defendants didn't oppose that Motion, and so I'll do
9 that and we'll docket that Order as soon as today's hearing is
10 finished, so thank you.

11 I know that you all probably have noticed that the
12 Sprinkmann Order or the Memorandum in support of the Order is
13 on the docket and today the Wisconsin Electric Memorandum also
14 hit the docket, hoping to get Papst on here in the next couple
15 of days to get you the reasoning and that is where I'll move it
16 if that causes any issues with regard to scheduling so I just
17 wanted to give you a heads up on that in terms of timing.

18 With regard to the schedule that you-all proposed,
19 and I know some of this also is drawn from the MDL Order and
20 probably from Judge Clevert's Order as well, I've gone over
21 that and want to walk through the dates that you've agreed on
22 and some of the dates that you've left open so we can resolve
23 those and get maybe some hearing dates as well.

24 So you proposed September 1st, 2017 for completing
25 depositions of the experts and the treating physicians, as well

1 as Ms. Ahnert and it looks like everyone is in agreement on
2 that date so that is fine.

3 And then a deadline for filing *Daubert* Motions and I
4 know that neither the MDL Court nor Judge Clevert made any
5 specific -- or I didn't make any specific reference to that
6 but, of course, that's understandable that there are going to
7 be such motions in this case. The deadline you-all have
8 indicated is September 21st, 2017, that's fine.

9 And then responses to those motions October 16th,
10 2017.

11 And replies October 30th, 2017, so those should be
12 something that no one needs any extensions of time on any of
13 those, those should be fully briefed, the *Daubert* motions as of
14 October 30th.

15 You-all suggested in Number 7 of your -- of your
16 Proposed Scheduling Order that there be a hearing on that in
17 November. I wish I could tell you that I could manage that
18 with the way our calendar is, but it's probably more likely
19 going to be in mid-December, early to mid-December. But I'm
20 more than happy to look at a date for that and get that
21 (indisc.).

22 Then in addition you-all have proposed October 13th
23 for Motions in limine, the nondispositive trial motions and
24 then responses to that by November 3rd.

25 I think, unless anybody has strong objections, that

1 if there are any issues that come up in those that need to be
2 heard we can do those at the same time as a hearing on the
3 *Daubert* motions unless anybody has an objection to combining
4 that hearing.

5 Okay, so we'll come back to that in just a second and
6 get a hearing date on that.

7 Then you proposed that 21 days prior to whatever date
8 we set for trial to depose any witnesses that are unavailable,
9 that's fine.

10 December 15th you-all had proposed for the -- for the
11 Final Pretrial report. Let me come back to that in a second.

12 And then December 22nd you had mentioned
13 supplementing any past discovery responses about either setoff
14 or any claims in bankruptcy.

15 And then the Final Pretrial date and a trial date
16 which you-all anticipate will be nine to 10 days.

17 So let's go backward and, first of all, see if we
18 can't get a date for a hearing on the *Daubert* motions and
19 Motions in limine. So if you want to look at your calendars in
20 December?

21 **(Pause)**

22 **THE COURT:** Sorry, just give me one moment here.

23 **(Pause)**

24 **THE COURT:** I am looking at Friday, December the 8th
25 and I can give you morning or afternoon, although I'm guessing

1 people might prefer morning given that it's a Friday.

2 **MR. MC COY:** I have a question on that hearing,
3 Judge?

4 **THE COURT:** Sure, Mr. McCoy.

5 **MR. MC COY:** How your Honor sees that being conducted
6 because the -- and this Scheduling Order is the product of a
7 lot of other remanded MDL cases combined with the -- in fact,
8 we've got the two cases here that we've spent time on.

9 **THE COURT:** Yeah.

10 **MR. MC COY:** Fortunately, we actually anticipated
11 your Order, I think, so this was well in the works.

12 **THE COURT:** Okay. Thank you for all the work you-all
13 did for that.

14 **MR. MC COY:** Yeah, otherwise it's a lot of time in
15 Court to figure this out, I'm sure.

16 **THE COURT:** I'm sure.

17 **MR. MC COY:** So -- so the question I have on *Daubert*
18 is this, and you know, that's -- do you -- does your Honor
19 believe that there's going to be any live witness testimony, or
20 is that something that is up to the parties on *Daubert*? 'Cause
21 I've had -- I've had it both ways, and it seems like *Daubert*
22 hearings have all of a sudden just become routine in scheduling
23 whereas two years ago they weren't, but I -- I've seen it go
24 both ways depending on the Judge.

25 **THE COURT:** Yeah.

1 **MR. MC COY:** And sometimes I believe it's helpful if
2 there is something that's controversial. I believe in asbestos
3 there's been so many *Daubert* hearings, but I can't say there's
4 been perfectly consistent results so that -- I leave that up to
5 your Honor to give us whatever guidance you want on that, but
6 that obviously affects the length of the hearing itself.

7 **THE COURT:** Right. And -- and also you had indicated
8 that they're not always consistent results and some of that is
9 because it's not always the same experts and it depends on the
10 expert and what the expert's report says.

11 **MR. MC COY:** It's often -- it's often though it is
12 the same expert and -- and it's still not consistent.

13 **THE COURT:** Well, and you know just because you get a
14 black dress doesn't mean you have to do things the way
15 everybody else who gets a black dress does so I can't --

16 **MR. MC COY:** Right.

17 **THE COURT:** -- that I can't -- that I can't -- that
18 problem I can't resolve for you.

19 But generally my thoughts are three-fold on that in
20 the event that this helps:

21 Number 1, I'm not requiring anybody to make any
22 argument on *Daubert*, and if you believe that your pleadings are
23 sufficient and you don't think that any argument is necessary,
24 this is the same boat that I've fallen into before Summary
25 Judgment worked for a long time, I decided Summary Judgment

1 arguments without argument and everybody in the world thought
2 that was horrifying and why aren't you giving people argument?

3 So then I started giving people argument in Summary
4 Judgment and people said "I don't know why you need argument,
5 you have those pleadings, and if we work so hard on them why do
6 we need to show up and argue again?"

7 And in the end I just kind of said "Look, if you want
8 to make an argument I'll hear it; if you don't want to, unless
9 I have something specific that I have a question about that I
10 think argument would resolve I don't see any need for you to
11 make it just to entertain me."

12 So that's Rule Number 1 is that if you-all come to
13 the conclusion after filing your motions that you don't think
14 there's really anything that any of you want to make argument
15 on I'm more than happy not to have you spend that time.

16 Second of all, with regard to whether I anticipate
17 witnesses, as a routine matter I assume that that is something
18 that you-all are going to make a decision about.

19 If the *Daubert* decision comes down to and it seems
20 somewhat unusual to me that it does, a question of the
21 credibility of the expert then I guess you certainly definitely
22 need testimony. But most *Daubert* motions that I see and I've
23 seen far fewer of them, I'm sure, than you-all have given --
24 given your area of work, that most *Daubert* motions that I see
25 seem to come down to an argument, a legal argument that, you

1 know, whatever the expert based his or her conclusions on was
2 not appropriate or, you know, that even if we take as true the
3 expert's testimony that it doesn't help the trier of fact in
4 any way, some iteration of an argument of the legal
5 ramifications of the *Daubert* standard. So in that event I
6 don't know what witnesses contribute to that and I can't
7 specifically answer your question, Mr. McCoy, as to this case
8 only because I don't -- I don't know -- you-all are going to
9 know much more about who these experts are and what -- what
10 their reports are going to disclose, so I would say that in
11 many respects I leave that to you-all.

12 Now I realize that that causes issues with regard to
13 scheduling a hearing because if I say, you know, it will take a
14 half a day or even the whole day on a Friday, and then it turns
15 out that somebody wants to call seven witnesses that's going to
16 bollix things up somewhat I would guess in terms of setting
17 aside a day.

18 **MR. MC COY:** I wasn't anticipating live testimony in
19 this case because it's a pretty traditional set of asbestos
20 exposures for pipefitters in an occupation or the second most
21 common with mesothelioma or asbestos disease, so I wasn't
22 anticipating anything on my own, but anyway -- so, I mean, I'm
23 fine if it's a half a day.

24 **THE COURT:** Okay. And I don't know if the Defense
25 has any sense yet of whether or not you'd want to call

1 witnesses or not?

2 **MR. RHOADES:** Your Honor, this is Travis Rhoades. I
3 don't -- I don't anticipate calling witnesses. We're going to
4 depose these folks between now and then so --

5 **THE COURT:** Right.

6 **MR. RHOADES:** The only reason that I would think that
7 we would potentially need a live witness is if you had
8 questions that we had forgotten to ask, and then --

9 **THE COURT:** The likelihood of you-all forgetting to
10 ask questions as opposed to me is pretty well -- Ms. McLain?

11 **MS. MC LAIN:** We don't anticipate calling any live
12 witnesses at the time of the *Daubert* hearing either, your
13 Honor.

14 **THE COURT:** So why don't -- why don't we plan it for
15 the morning of the 8th and if it dribbles over a little bit
16 into the afternoon, fine, but if you-all come upon, after
17 you've done the depositions and you've thought this through now
18 that some time has passed, if you think that there's going to
19 be a need for a witness and you think that day is not going to
20 cut it everybody get on the phone to chambers and we can see if
21 we can get it -- a different date.

22 I will tell you that right now I've got trials
23 scheduled for the next two weeks of December, in fact a single
24 trial scheduled for the next two weeks of December. As you all
25 well know it may or may not go, so -- but that makes the

1 calendar a little tighter.

2 So why don't we say 9:00 a.m. on the 8th of December
3 for that hearing?

4 And if we could also include, if there are any
5 Motions in limine that need argument, again, not requiring
6 anybody to make it if the motions you believe are self-
7 explanatory, fine; but if you believe that there's some
8 argument that's necessary we can do the same, we can deal with
9 those at the same time if that works for folks.

10 In terms of a final Pretrial Conference and a trial
11 date you've got December 22nd for updating your discovery
12 responses.

13 Let me just tell you in terms of a nine to 10 day
14 trial I'm going to probably have to look out some so --

15 **(Pause)**

16 **THE COURT:** I'm sorry, just give me a second, I'm
17 trying to find a hole here.

18 **(Pause)**

19 **THE COURT:** I will tell you that the first place on
20 my calendar right now that I can accommodate a trial of that
21 length is starting the week of May 14th of '18. That's not to
22 say that we might not have some things fall off, but as of
23 right now that's the first two week chunk that I have clear.

24 **MS. MC LAIN:** Your Honor, my only concern with May
25 14th is I do have a (indisc.) trial in Cook County that starts

1 May 8th and it's because of the number of parties in that case
2 it could spill over into the week of the 14th so I don't know
3 that I would be available at that time.

4 **THE COURT:** Okay. Well, the next option would be --
5 because once we get out into that territory I'm relatively
6 clear, excuse me, so we could start it the 21st and go into the
7 next week, the 28th. I know that doesn't give you a whole lot
8 of breathing room between the two trials.

9 **MS. MC LAIN:** No, I understand. I hope we will be
10 done by then.

11 **THE COURT:** You're stuck in Cook County for two
12 weeks.

13 Mr. McCoy?

14 **MR. MC COY:** That's fine for Plaintiff. I mean your
15 earliest date is certainly what we want, (indisc.) mid-80s now.

16 **THE COURT:** Okay.

17 **MR. RHOADES:** I have no objection to either date
18 although my calendar doesn't tell me which day is Memorial Day.
19 Is one of those Mondays Memorial Day?

20 **THE COURT:** That's a good question, isn't it. Mine
21 doesn't either.

22 **MR. MC COY:** The last -- last Monday in May.

23 **THE COURT:** It usually is.

24 **MR. MC COY:** All right.

25 **MR. RHOADES:** Stupid electronic calendars --

1 **THE COURT:** But the jury of Google is that it's the
2 28th so that is when it is. So, you know, one option is to
3 start on the 21st and then resume the Tuesday of the 29th.

4 Another option is to move out into June, and that
5 depends on whether you-all want an interruption there or
6 whether anybody's going to be traveling.

7 **MS. MC LAIN:** Personally I would not mind moving it
8 into June just to be on the safe side with my other trial and
9 hopefully with experts coordinating schedules and everything
10 because of Memorial Day.

11 **THE COURT:** Yeah, that's true.

12 Mr. McCoy, June? We could do the first week and the
13 second week.

14 **MR. MC COY:** Whatever is earliest, Judge. I'm not
15 going to quibble over a month.

16 **THE COURT:** I know. Okay. So what -- should we say
17 the week of June 4th and going into the week of June the 11th?

18 **MS. MC LAIN:** Sounds good.

19 **THE COURT:** Okay. And then for our final Pretrial
20 Conference ahead of that, I know, Ms. McLain, you're in trial
21 the week of the 8th and it may go over into the following week.
22 When does your trial start, the 8th --

23 **MS. MC LAIN:** It starts on the 8th.

24 **THE COURT:** Okay.

25 **MS. MC LAIN:** And with Cook County it may -- that's

1 usually when we get our Judge assignment but we don't
2 necessarily start --

3 **THE COURT:** Start that day?

4 **MS. MC LAIN:** -- start that day.

5 **THE COURT:** Okay. So the options either are to do it
6 the week before the final Pretrial Conference -- unfortunately
7 I am in Washington the 7th and 8th, so I could do the final
8 Pretrial Conference in the latter days, but then it sounds like
9 you probably are going to be in -- dug in.

10 **MS. MC LAIN:** It may spill over, yeah.

11 **THE COURT:** So what about May 3rd, which is the week
12 before your trial starts?

13 **MS. MC LAIN:** That works fine.

14 **MR. MC COY:** That's -- that's good, Judge.

15 **THE COURT:** Okay.

16 **MR. RHOADES:** No, we've got a Summary Judgment
17 hearing, Bob, in Milwaukee County in the Strong case that
18 morning.

19 **THE COURT:** Morning? Could we do it -- I know I have
20 a (indisc.) afternoon, but --

21 **MR. RHOADES:** It typically takes a few hours, so I
22 would -- maybe afternoon.

23 **THE COURT:** Yeah, I'm okay with afternoon. I've got
24 that -- we could even do at like 2:30 -- if you wanted a 2:00
25 o'clock, would that give you enough room?

1 **MR. RHOADES:** I -- unless the Milwaukee County Judge
2 develops a real keen interest in the case I think so.

3 **MR. MC COY:** That's Judge DiMotto, right?

4 **MR. RHOADES:** It is.

5 **THE COURT:** Well, he could develop a really keen
6 interest in the case. He's developed many keen interest in
7 many other cases, Judge DiMotto has.

8 **MR. MC COY:** Right.

9 **THE COURT:** Well, do you want to --

10 **MR. MC COY:** Can it be -- can it be the following day
11 or the preceding day?

12 **THE COURT:** In other words the 2nd or the 4th?

13 **MR. MC COY:** Right.

14 **THE COURT:** Yeah, it could be either one of those
15 because right now we're clear out there. Anybody have a
16 preference?

17 **MR. RHOADES:** I'm wide open, too, your Honor.

18 **MS. MC LAIN:** I'm wide open.

19 **THE COURT:** Okay. Why don't we do the 2nd?
20 And if the morning works?

21 **MR. MC COY:** Fine.

22 **THE COURT:** We could do 9:00 o'clock again?

23 So that's May 2nd.

24 And then let me just -- if it's okay with you-all if
25 I could get back to you on the deadline for your Pretrial

1 report 'cause I think the one that I laid out in my procedures
2 on line it's probably not practical for a case of this nature.
3 I know you all had suggested that date, too, and then I put
4 notes in here to myself that I will fully confess to you now
5 don't make any sense to me. As I'm reading them I'm not sure
6 what I was thinking, so if I could get back to you-all on the
7 date for the -- for the final Pretrial report?

8 **MR. MC COY:** That's fine. That's who you're
9 expecting like 30 days before roughly, something like that?

10 **THE COURT:** I think it should be -- usually I do
11 seven days before the Final Pretrial Conference or something
12 along those lines, but it -- you know, it may be better to do
13 it sooner than that given the circumstances here and the number
14 of witnesses that may be called.

15 So what else -- I mean, you-all, I know you've put a
16 lot of work into this and you've covered a great deal of
17 territory which I appreciate, so what other things perhaps have
18 you not covered here that you think I ought to be thinking
19 about?

20 **MR. MC COY:** Not in this Order, Judge, is there's a
21 Motion I believe we -- my firm now filed with Judge Robreno to
22 remand punitive damages from the MDL.

23 **THE COURT:** Okay.

24 **MR. MC COY:** So we'll get that ruled on pretty soon.
25 I can't say exactly when, but he usually will rule on that

1 rather quickly because he's had those and other mesothelioma
2 cases before.

3 **THE COURT:** Okay. All right, then we'll just keep
4 an eye open for that. And I assume I'll get a notice from the
5 MDL Board or the MDL Panel if it gets remanded.

6 **MR. MC COY:** Right.

7 **THE COURT:** What else? Ms. McLain, other issues
8 that --

9 **MS. MC LAIN:** I don't think so. I think surprisingly
10 we had a pretty comprehensive conference last week and I think
11 we were able to get through most of the issues that we needed.

12 **THE COURT:** Okay. Okay, good.

13 Mr. Rhoades?

14 **MR. RHOADES:** There is one issue, your Honor, and I -
15 - unfortunately I have not done the entirety of the research to
16 even know how to describe the motion, but what we have here is
17 two different cases, as you know, with two different procedural
18 histories.

19 **THE COURT:** Yes.

20 **MR. RHOADES:** And the discovery taken in both cases
21 is a little bit different with respect to my clients.

22 **THE COURT:** Yes. As you know I'm aware of that from
23 the Summary Judgment rule.

24 **MR. RHOADES:** And so I anticipate potentially filing
25 a motion that would ask the Court to enforce the discovery

1 rulings in the earlier case which would exclude some of the
2 testimony taken in the later case.

3 I'm not 100 percent sure that I'm going to file a
4 motion so I -- and I'm not even sure how to characterize it
5 whether it's a Motion in limine or not, so I guess I would
6 anticipate getting through that and -- and letting the Court
7 know within two weeks from today about whether that motion is
8 -- has got sufficient legal authority to even make it worth
9 filing, but I do want to make sure that I look at that issue
10 and argue it if it's available.

11 **THE COURT:** You know, and I haven't looked at it at
12 all, obviously, because, as you indicated, it's something
13 you're considering and haven't looked into, but -- or haven't
14 looked as fully into it as you would like to, but as you all
15 will recall, 100 years ago when the Plaintiffs first raised the
16 issue of consolidation and I said I didn't want to do that at
17 that point in time because there were Summary Judgment motions
18 that were much further advanced in front of Judge Clevert and
19 we were just in different procedural postures, and I know that
20 I've granted the motion to consolidate because now it seems
21 somewhat ridiculous to consider trying this case separately --
22 these cases separately when we have identical Defendants and
23 the cites are all the same and so forth and so on. But I would
24 -- I'd be interested in seeing any research that you can
25 produce about differences in the discovery posture, and one of

1 the things we talked about ages ago was the argument that the
2 jury would get confused about evidence that would relate to the
3 2013 case that isn't in the 2010 case or vice versa, and I get
4 that, but I think I expressed a view back then that juries
5 tended to be fairly good at rooting through what they needed to
6 root through, especially if they were given the right
7 instructions and that they were given argument about it.

8 And as you all know, the case spent a lot of time in
9 front of Judge Robreno and it spent a lot of time in front of
10 me, not to mention all of the time that the 2013 case spent in
11 front of Judge Clevert, so I -- given as much water as is under
12 the bridge I would just caution everybody to think hard about
13 that before we head off in that direction.

14 And I know -- I know you were saying you're --

15 **MR. RHOADES:** Understood. And it's really one
16 witness, it's Charles Lewitsky (phonetic) --

17 **THE COURT:** Right.

18 **MR. RHOADES:** It's the testimony that wasn't taken in
19 the 2010 case that was taken in the 2013 case which expands the
20 case against my clients from just the 1989 period --

21 **THE COURT:** To the --

22 **MR. RHOADES:** -- back into the '60s.

23 **THE COURT:** Right. Right. Well, then I'll leave it
24 to you to analyze and just kind of -- I -- I am grateful for
25 all of the work that you-all did to get us to the point today

1 that we're able to get dates on the calendar and just start --
2 to start working in that direction and so I would like to see
3 us continue to make some progress forward if we can. Okay.

4 **MR. RHOADES:** If there's no merit I won't bring it,
5 Judge.

6 **THE COURT:** I know. I know. I know.

7 I remember being in front of the Seventh Circuit once
8 and Judge Easterbrook went off on me about a frivolous
9 argument, and I said I hope I've practiced in front of this
10 Court long enough by now to know that -- for you to know that
11 if I thought it was frivolous I wouldn't have brought it, I
12 actually do have some legal basis for it, and he -- he rolled
13 his eyes at me and then said "Move onto your next argument."
14 Okay, well -- I -- I clearly made a good impression with that
15 -- with that argument, so --

16 **MR. MC COY:** I was just testing you, Judge.

17 **THE COURT:** Yeah, yeah, I'm sure -- I'm sure that's
18 what it was. So -- so if there's anything in between now and
19 dates that we've set that you need help on please don't
20 hesitate to call chambers with all parties on the line. I tend
21 to be less formal than some of the other Judges in terms of,
22 you know, if you need to file a motion file a motion, but if
23 there's simply an issue that you think a half hour talking to
24 me on the phone will resolve, you should call with everybody on
25 the line, I'll try to get on with you if I'm available, and if

1 I'm not my folks will know generally where I am. If any issues
2 come up in a dep, same deal, give a call. If I'm not available
3 we'll try to at least figure out if I can get on the phone with
4 you from wherever I am to help resolve that, so don't hesitate
5 to call if you need anything of that nature, okay?

6 Thank you everybody for your work, we'll talk to you
7 soon.

8 **MR. MC COY:** Thank you.

9 **MR. RHOADES:** Thank you, your Honor.

10 **(This proceeding was adjourned at 3:32 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is positioned above a horizontal line.

February 7, 2018

TONI HUDSON, TRANSCRIBER